Lee Brass Company *and* Jackie Hogan. Case 10–CA–27044

March 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On May 25, 1994, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and the briefs and has decided to affirm the judge's rulings,[1] findings[2] and conclusions,[3] and to adopt the recommended Order as modified.

The judge concluded that the Respondent's unlawful failure to reinstate Hogan to her former position in the assembly and test (a&t) department began on April 1, 1993, 2 days after she returned to work as an incentive grinder pursuant to a settlement agreement. The Respondent excepts to this conclusion. We agree with the Respondent. The settlement agreement required Respondent to reinstate Hogan to the position of incentive grinder, not to her old position in the a&t department. We recognize that there were no a&t vacancies at that time because of a transfer of employees into those positions shortly before the settlement. However, no party seeks to set aside the settlement agreement. Accordingly, there can be no attack on the presettlement transfers, and the Respondent's reinstatement of Hogan was in compliance with the settlement. Thus, the cognizable violation did not occur until July 2, 1993, the date on which the first postsettlement vacancy opened with the retirement of assembly and test employee Earl Williamson. We shall modify the Order accordingly.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lee Brass Company, Anniston, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Make whole Jackie Hogan for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful refusal to transfer her to the assemble & test department as of July 2, 1993.''

2. Substitute the attached notice for that of the administrative law judge.

[1] We find the Respondent's contention that the judge denied it an adequate opportunity to present its case to be meritless. Contrary to the Respondent's suggestion, the judge did not indicate that the hearing was limited to 2 days. Moreover, before closing the hearing, the judge asked the Respondent whether it wished to present any more documents, witnesses, or evidence, and the Respondent answered ''No, sir.'' We also find no foundation in the record for the Respondent's claim that it received inadequate notice of the General Counsel's theory of the case. Indeed, the General Counsel's opening statement was consistent with a comparative experience theory, the theory that the Respondent claims the General Counsel ''switched to'' near the end of her case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also excepts to the judge's finding that employee David Turner, who was transferred from shipping to the assembly and test department, had no experience in assembly and test. Although it appears that Turner had worked in this department (then called ''packing'') in 1977–1978, we find this fact irrelevant, because Plant Manager Ed Gearhart never cited this experience in attempting to explain why he transferred Turner to assembly and test rather than reinstate Hogan to her former position in that department. We further note that in adopting the judge's finding that Turner and Travis Bryant were transferred to assembly and test on March 1, 1993 (and not earlier as claimed by the Respondent), we place no reliance on the Respondent's failure to call these employees as witnesses.

Finally, the Respondent excepts to the judge's finding that its failure to find alternative work for Hogan when she developed a work related disability, when it had done so for Steve Jones, constituted disparate treatment. Because Hogan's medical condition (unlike Jones') precluded any contact with brass, we find that the Respondent had no alternative jobs that Hogan could perform, and therefore did not engage in ''disparate treatment'' in placing her on disability leave. We do, however, fully agree with the judge's broader finding that the Respondent's initial failure to fill the assembly and test vacancy arising on July 2, 1993, and its subsequent transfer of Jones into that department were discriminatorily motivated.

[3] In adopting the judge's conclusion that the General Counsel established a strong prima facie case that the Respondent's failure to return Hogan to her former position in assembly and test was discriminatorily motivated, we do not rely on his findings regarding ''rollbacks'' or on the finding that the General Counsel's evidence established that the Respondent's past practice was to rely primarily on comparative experience rather than seniority in awarding jobs. We do, however, fully agree with the judge's assessment of the Respondent's evidence regarding past practice. We find it significant that in attempting to meet its rebuttal burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Respondent was unable to produce a single bid in which an employee with relatively short-term experience in the job prevailed on the basis of seniority over an employee with years of experience in that job.

[4] The judge also ordered that the Respondent compensate Hogan for any medical expenses attributable to its unlawful conduct. Rather than specifically order reimbursement of any medical expenses, we shall provide the customary make-whole remedy and leave the question of medical expenses to the compliance stage of this proceeding. *Pilliod of Mississippi*, 275 NLRB 799 fn. 3 (1985).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in Glass, Molder, Pottery, Plastics, and Allied Workers International Union, or any other labor organization, by failing to reinstate or transfer employees to their former jobs, because of their union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL assign Jackie Hogan to her former job in assemble & test on her request, and WE WILL make her whole, with interest, for any loss of earnings and other benefits she may have suffered because of our failure to assign her to this position.

LEE BRASS COMPANY

Ellen Hampton, Esq., for the General Counsel.
Harry L. Hopkins Esq. and *James C. Pennington, Esq. (Lange, Simpson, Robinson & Somerville)*, of Birmingham, Alabama, for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on September 30, 1993, by Jackie Hogan (Hogan) and complaint issued on November 26, 1993. It alleges that Lee Brass Company (Respondent or the Company), since April 1, 1993, refused to allow Hogan to return to the position she had held prior to May 22, 1992, including its failure to award her a bid on such a position in September 1993, because of her membership in and leadership role on behalf of Glass, Molders, Pottery, Plastics and Allied Workers International Union (the Union). The complaint alleges that this was violative of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

The hearing opened before me by telephone on February 3, 1994, was continued to February 28, 1994, in Anniston, Alabama, and concluded on March 1, 1994. Thereafter, the General Counsel and the Respondent filed briefs. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with an office and place of business in Anniston, Alabama, where it is engaged in the manufacture of valves and fittings. During the year preceding issuance of the complaint, a representative period, the Respondent sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of Alabama. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Board has previously conducted an election involving the Union. Based on this, Hogan's testimony describing her activities on behalf of the Union, and a settlement agreement entered into between the Respondent and the Union,[1] I conclude that the latter is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Representation Case*

The Union filed a petition to represent certain of the Respondent's employees on April 14, 1992, and a Board election was held on June 12, 1992. Challenged ballots were determinative, and an Order issued on December 11, 1992, combining the representation case (Case 10–RC–14238) with a complaint alleging unfair labor pratices (Case 10–CA–26130). Thereafter, the unfair labor practice case was settled, the representation case was severed, and a hearing on challenged ballots was held in April 1993. The hearing officer issued a report on challenged ballots, and exceptions to this report are presently before the Board.[2]

B. *Hogan's Presettlement Union Activities*

The General Counsel elicited evidence of Hogan's union activities for the purpose of establishing the Company's postsettlement animus. Receipt of such evidence for this purpose is appropriate.[3]

Early in 1991, Hogan asked the Union for authorization cards. She received them, and obtained signatures on 20 or 25 cards. Others were submitted, and a union campaign followed.

In February 1992, Hogan had a conversation with Plant Manager Ed Gearhart and Personnel Manager Andy Huddleston.[4]

Huddleston told Hogan that she had been threatening employees about crossing picket lines and not signing union cards, and that the next time it happened she would be fired.

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[1] G.C. Exh. 2.

[2] Stipulation of the parties, G.C. Exh. 2.

[3] *Northern California District Counsel*, 154 NLRB 1384 fn. 1 (1965); *Steves Sash & Door Co*., 164 NLRB 468, 476 (1967); *Proto Plastics Co*., 275 NLRB 1379, 1380 (1985).

[4] The pleadings establish that Gearhart and Huddleston were supervisors.

Hogan denied the accusation and said that they would have to have a reason for firing her. Gearhart replied that he could fire her without a reason, that he could fire everybody and hire new employees, and that he was going to fight the Union with everything that he had. Hogan responded that she was for the Union ''hook, line, and sinker.''

Gearhart testified that he had a conversation with Hogan and Huddleston, and had statements from employees about Hogan. Later, the Company posted a notice on a bulletin board stating that an employee had been threatening other employees, and that the Company wanted to be notified if it happened again.[5]

In May 1992, about 160 employees, including Hogan, were terminated in what the Company called a reduction in force. Hogan at that time was assigned to the assemble & test department.

In June 1992, Hogan was a union observer at the Board election. Thereafter, Region 10 issued a complaint alleging that Hogan and several other employees had been discriminatorily discharged. On March 3, 1993, the parties entered into a settlement agreement. By its terms, some of the alleged discriminatees received backpay, while Hogan and two others were reinstated with backpay, and were granted 18 months of their original seniority date.[6]

C. *Posting New Jobs and Selecting Employees*

1. Background

The General Counsel's position is that the Respondent manipulated its assignments so as to prevent Hogan from being reinstated to the assemble & test position which she had before her discharge. In order to assess the evidence, the Company's method of choosing employees for job openings must be determined.

The Company's handbook specifies the procedure for filling available job openings. Such openings ''will be made available'' by this procedure.[7]

The Company is divided into various groups, and employees within each group get a first opportunity to bid on a job. In a section entitled ''Plant Wide Job Openings,'' the handbook further provides:

> In the event no employee bids the job vacancy from the group posting, the job vacancy will be made available plantwide for forty-eight (48) hours . . . . An employee will not be awarded more than one (1) plantwide job opening in a twelve (12) calendar month period.

The handbook also bars awards of jobs if the employee is in a training period or a disciplinary ''step,'' unless waived by management. With respect to both group and plantwide bids, the handbook specifies that the factors considered are (1) seniority; (2) attendance, work habits, ability, and experience; (3) physical condition; and (4) entrance qualification requirements (for skilled trades only). The job will be awarded to the ''senior most qualified'' employee. When factors 2, 3, and 4 are ''substantially equal,'' seniority shall govern.[8]

Company Personnel Supervisor Patricia McLeroy receives requests from department supervisors for job postings. She normally checks with Plant Manager Gearhart, and then prepares the posting, stating the date it was put up, and the date it will come down. This is posted on bulletin boards. The bid sheet is kept in the personnel office, and interested employees must come to the office and sign it. ''Individuals wishing to be considered must sign the required form. No oral bids will be considered.''[9] These names are then typed on a list by seniority, the most senior employee at the top of the list. According to McLeroy, the departmental supervisor then determines whether the most senior employee has experience in the job, utilizing personal interviews and personnel records.

The evidence of the supervisor's ratings of the bidders appears on the left side of the seniority lists. Although not all of them are signed by the supervisors, McLeroy's testimony establishes that these ratings were made by the departmental supervisor.[10]

The parties advanced conflicting interpretations of the Company's use of the criteria in the handbook—the job is to be given to the ''senior most qualified'' employee, but seniority is to govern when the other factors are ''substantially equal.'' There are numerous exhibits where a more senior job applicant is rejected because he has ''no'' experience. The issue is whether an applicant with more experience, e.g., having held the job previously as a regular position, is ''more'' qualified than one who held it only temporarily.

2. The General Counsel's evidence

a. *Jackie Hogan*

Hogan testified that 90 days of experience were required before transfer to a new job and that she was denied a transfer to a machine shop opening because she did not have that experience.

b. *Donald Vinson*

Donald Vinson was hired in 1976. He was working in the Wrot department at the time of the May 1992 reduction in force, but was not laid off. Instead, Vinson went to the cleaning room as an incentive buzzer. In August 1993, he was awarded a plantwide bid on a job in the machine shop.

On November 30, 1993, two machine operator level VI jobs were listed in a ''plantwide'' posting. The posting stated that the employee must be able to read blueprints and run a lathe. Donald Vinson testified that he had read blueprints, had run a lathe for about a month, and that the supervisors knew this. The supervisor told Vinson that the employees who had done the work previously would get the jobs. One of them, Mike Rogers, had less seniority than Vinson.

The seniority list says nothing about Vinson's qualifications. Opposite his name in the listing is the legend: ''P/W (plantwide) job bid Aug 8-12-93.''[11] Vinson testified that he was assigned to the machine shop at the time of the November posting.

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[5] Hogan's uncontradicted testimony concerning these events is credited.

[6] G.C. Exh. 3.

[7] R. Exhs. 1 and 12.

[8] Id.

[9] Id.

[10] In discussing one of the seniority lists, G.C. Exh. 15, McLeroy testified specifically that ''the supervisor'' said one of the applicants was ''not qualified.''

[11] G.C. Exh. 22.

As described above, the handbook limits awards resulting from plantwide job bids to one in a consecutive 12-month period. However, there is no such restriction in the section of the handbook dealing with bids from within a group. Vinson was within the machine shop at the time of the bid.

Respondent argues that Vinson did not get the job because of his previous plantwide bid. However, this was not the reason given to Vinson by the supervisor, according to Vinson's uncontradicted testimony. As indicated, that testimony was that the supervisor said the employees who held the jobs previously would get them again.

c. *Henry McRath*

Henry McRath had worked in the Wrot department, which the Company decided to discontinue at about the time of the May 1992 reduction-in-force. McRath was not laid off, however, and continued to work. The factual issue is whether he worked in the ''Hays Water Works,'' and thus acquired experience for that work, or continued to do unrelated work.

On cross-examination, McRath testified that the Hays department was ''in'' the Wrot department. McRath stated that he spent some time tearing down Wrot machinery, but also spent about 2 months putting valves together. This, the General Counsel contends, was Hays department qualifying work.

A posting for an assembler job in the Hays department was put up on July 10, 1992, and was awarded to Samuel Richey, who was junior to McRath on the seniority list. According to Supervisor J. D. Hamm, Richey was ''fully qualified.''[12] Richey then started doing the same work McRath had been doing, i.e., assembling valves.

The seniority listing shows McRath as having ''no experience'' in the posted job. He protested to Supervisor Hamm, and asserted his experience in the work. According to McRath, he had been doing the work ''right in front of Hamm's face.'' The supervisor said that McRath did not have ''enough experience.''

The Company argues that McRath's testimony is inconsistent with his personnel record, from which Respondent read during cross-examination. I perceive no inconsistency. Neither Hamm nor Richey was called as a witness. I credit McRath, and conclude that he had about 2 months of experience in the Hays department work, which was ''not enough'' to win the job from the ''fully qualified'' Richey, who was junior to McRath in seniority.

d. *Geraldine Bradford*

Geraldine Bradford started working for the Company in 1979. She started in the assemble & test department, and remained there about a year as a regular employee. Although there is no documentary evidence of this, Bradford described the jobs and asserted her capacity to perform them. Bradford was later transferred to other departments, but continued to help out in the assemble & test department about three times per month. Supervisor Wayne Haynes was aware of this work.

On January 3, 1991, two jobs in the assemble & test department were posted. Bradford applied, but the jobs went to employees who were junior to her, one of whom was Jackie Hogan. Bradford was said to be ''not qualified.''[13] Hogan testified that Bradford had performed weekly in assemble & test, but that 90 days there were required. Hogan got the job.

Two more postings in the same department went up in October 1991, and another employee who was junior to Bradford in seniority was selected.[14]

Bradford protested to Personnel Manager Huddleston, who told her that she was not qualified. She then went to Wayne Haynes, in the assemble & test department. He also told Bradford that she was ''not qualified.'' ''Wayne,'' Bradford replied, ''you know that I have done that job before; you know I worked in this department.'' Haynes responded that she had to have been a ''permanent person'' in order to be qualified, and that he did not recall that she had permanent status. Haynes did not testify, and I credit Bradford.

3. The Company's evidence

a. *Tony Vinson*

The Company submitted documents and testimony which, it claims, lead to a conclusion opposite from that suggested by the General Counsel's evidence. Thus, Tony Vinson is said to have been awarded a material handling job in August 1993, despite the fact that he had less experience than another employee, Ronnie Langley.[15]

Unlike other seniority lists, this one does not give the reasons other bidders were not selected, e.g., ''not qualified,'' and Vinson's name is merely circled. The supervisor was ''W. Robertson.''[16] Personnel Supervisor McLeroy testified that Vinson got the job.

Langley's personnel record shows that he was hired in 1977. There is no detailed record of his specific job duties from that date to 1984. Thereafter, he was continuously employed in the machine shop. Personnel Supervisor McLeroy identified a third page to Langley's personnel record as a copy of the ''payroll master maintenance form for August 4, 1981.'' This page states that Langley was incorrectly classified as material handler ''direct labor,'' and was changed to material handler ''in-direct labor.'' There is no evidence that the supervisor who selected Vinson in 1993, W. Robertson, ever saw this sheet from a 1981 payroll maintenance form. Robertson did not testify. As indicated, there is no notation on the 1993 seniority sheet as to Langley's qualifications or the absence thereof.

b. *Shirley Lloyd*

The Respondent next submits the case of Shirley Lloyd, who applied for and received a job as a material handler posted on August 30, 1993. Lloyd was fourth on the seniority list. One of the three senior applicants was stated ''never to have done'' the job before, while the other two were disqualified because they had made a plantwide job bid within the previous year.

The next applicant was Lloyd, who was stated on the seniority list to be ''already qualified.'' The supervisor who

[12] G.C. Exh. 19.

[13] G.C. Exh. 15.

[14] Mark Watts (G.C. Exh. 16).

[15] R. Br. 14.

[16] R. Exhs. 2–3.

made this determination is unknown.[17] Although Lloyd was hired in 1955, the only jobs listed on her personnel record are from 1990 through September 1993, and these show continuous assignments in the Cleaning Room.[18] The Company introduced documents that Personnel Supervisor McLeroy identified as Lloyd's payroll slips. They indicate pay on nine different dates, beginning on June 13, 1993, and ending on August 15, 1993. Some of the documents have the initials ''MH'' on them, and all bear the pay rate of ''$6.95.'' The total hours worked exceed 160.[19] Personnel Supervisor McLeroy testified that ''MH'' meant ''material handler,'' and that this classification was the only one in ''that department,'' which paid $6.95. It may be noted that Lloyd's personnel record shows that she was employed as ''Level V Wheelabrator'' in the cleaning room, at $6.95, from September 17, 1990, until she was laid off in a reduction in force on September 17, 1990.[20]

There is no evidence of the experience of those individuals who were below Lloyd in seniority. The Respondent argues that Lloyd was awarded the job after ''only'' 24 hours of experience.[21] This is clearly erroneous.

c. *William Gary Robinson*

The Company contends that the case of William Gary Robinson supports its position. A job as ''CNC Operator Level VIII'' was posted on March 20, 1992. There were numerous applicants, and Robinson was third on the seniority list. The most senior applicant refused the position, and the next applicant was deemed to be ''disqualified.'' Robinson, next in line on the seniority list, got the job.

Robinson's personnel record shows jobs in the machine shop at Level VIII beginning in 1989, including about 2 months as a ''CNC Operator'' beginning March 11, 1992, and about 6 months in the same job beginning January 13, 1992, and ending in June 1992, when Robinson resigned.[22] An interdepartmental memo states that Robinson ''did have machine shop experience.''[23] There is no evidence whatever of the experience of others on the list, except a supervisor's comment that the applicant who was 2lst in seniority had no experience.[24]

d. *William McMichael*

Another CNC job was posted in September 1992, and William McMichael, who was third on the seniority list, was awarded the job. The first two applicants were deemed to have ''no experience.''[25] Personnel Supervisor McLeroy testified that the CNC equipment had been in the plant for about 5 years, and that McMichael had trained on it for ''several months.'' There is no evidence of the experience of any applicants below McMichael on the seniority list.

e. *Billy Gaddy*

Finally, the Company relies on Billy Gaddy's assignment as a material handler in August 1992, in preference to the only other and senior applicant, Henry McRath, who was deemed to be ''not qualified.''

Gaddy's personnel record indicates that he was given a temporary assignment as a material handler on July 28, 1992, and was classified in the same job a month later as the result of a ''plantwide job bid.''[26] There are no other listings on this record. McLeroy testified that Gaddy had only a temporary assignment. However, the second listing in the same job, as the result of a plantwide bid, suggests that the job was then made permanent. As indicated, the only other applicant was McRath, who was ''not qualified.''

4. Factual analysis

The Company's evidence suffers from the general defect that, when allegedly minimum experience by the winning applicant is cited, there is no evidence of the experience of the losing applicants. Obviously, even minimum experience is better than no experience, and the employee with this experience in a field of applicants with none would be the ''most qualified.'' This, however, does not decide the case when there is an applicant with more experience.

The second general defect is that the Company's evidence is sketchy. Old documents not included in the employee's personnel record are produced, and are deemed to have been considered by supervisors who did not testify, or who were not even identified.

The General Counsel, on the other hand, produced live testimony from the employees themselves, together with documentary evidence. That evidence shows that, when assessing employee qualifications, the Company compared the extent of one employee's experience with that of another and ignored seniority when one employee had more experience. Thus, Donald Vinson, who could read blue prints and run a lathe, lost out to Mike Rogers, junior in seniority, because Rogers had done the work previously. Henry McRath lost out to Samuel Richey, his junior in seniority, because McRath did not have ''enough'' experience. Bradford's bid failed because the supervisor did not know that she had previously been ''a permanent person'' in the job—said by the supervisor to be a requirement. I credit Jackie Hogan's testimony that she was denied a machine shop job because she did not have 90 days of experience.

I conclude that the Company's policy was to compare an applicant's experience with that of another applicant, and, when it was superior, to ignore seniority and grant the job to the ''most qualified'' applicant, in the language of the employee handbook.

D. *The Availability of Jobs in the Assemble & Test Department*

1. Summary of the evidence

Hogan's reinstatement took place at the same time that various transfers were made relating to the assemble & test and shipping departments, the former of which had been Hogan's assignment, and which she wanted.

[17] R. Exh. 9.
[18] R. Exh. 10.
[19] Id.
[20] Id.
[21] R. Br. 14.
[22] The beginning date of Robinson's second CNC assignment is not completely legible. I conclude that it is January 13, 1992. R. Exh. 6.
[23] R. Exh. 5.
[24] Id.
[25] R. Exh. 7.
[26] R. Exh. 12.

During the negotiations which began in February 1993, and which led to the settlement agreement and Hogan's reinstatement, Plant Manager Gearhart told Hogan that there were no openings in the assemble & test department, and that there were no employees there who were junior to Hogan in seniority. The General Counsel contends that both of these statements were false.

On February 23, 1993, the Company posted a job in the assemble & test department. The posting was signed by John David Hamm, supervisor. It stated that it was posted by order of ''Ed,''[27] and was necessary ''to increase manning.'' Travis Bryant had been on loan from the shipping department, but was needed back in that department.[28]

Personnel Supervisor McLeroy testified that she received an instruction to make this posting from the department manager. Thereafter, Plant Manager Gearhart told her to take it down. She did so. McLeroy testified that Gearhart sounded ''flustered.'' Gearhart denied authorizing the posting, and testified that he told McLeroy to take it down after he spoke with a Board attorney.

On March 1, 1993, Travis Bryant and David Turner were transferred to the assemble & test department.[29] There is no evidence that these transfers were in response to any bid.

On the same date, a job as a shipper was posted in the shipping department. It states that the reason was that David Turner and Travis Bryant had been assigned to assemble & test. The shipping job was awarded to Marvin Curvin.[30] At about the same time, Gary Thomas was also transferred to the Shipping department.[31]

Plant Manager Gearhart asserted that he had a ''plan'' to transfer Bryant and Turner to assemble & test, that they were actually being moved ''back and forth'' between Shipping and assemble & test, and were already in the latter department on a temporary basis. However, the Company keeps a weekly roster of employees by department. The roster shows that Bryant and Turner first appear in the listing of assemble & test employees during the week of March 2, 1993.[32] As appears hereinafter, this was one day before the Company signed the settlement agreement with Hogan.

Travis Bryant's personnel record shows that he had experience in the ''Finishing'' department (one of the names for assemble & test) in 1983.[33] David Turner had no experience in this department.[34] All their personnel records show is that they were assigned to the shipping department immediately prior to the March transfer to assemble & test, and there is no evidence of temporary experience, or ''back and forth,'' between shipping and assemble & test.

Gearhart contended that Curvin and Thomas were placed in the Shipping department in order to handle the ''Houston Shipping department,'' which was being transferred to Anniston. Asked why he did not use Bryant and Turner for this purpose, Gearhart said that he did not know. Although Gearhart said he had documentary ''plans'' for staffing of departments, none was introduced.

2. Factual analysis

There are contradictions in the Company's evidence. Thus, Gearhart's testimony that Bryant and Turner were already in the assemble & test department is not corroborated by the departmental roster or the personnel records. The records also contradict the February 23 posting for the assemble & test job, which asserted that Bryant had been on loan from the shipping department, while Turner is not even mentioned. Although there may be some explanation for these seeming inconsistencies, Respondent did not offer any.

Although Gearhart denied ordering the February 23 posting, in the absence of any testimony from Supervisor Hamm, I conclude that the ''Ed'' referred to in the posting was Plant Manager Edward Gearhart, and that it was he who ordered the posting. As Gearhart agreed, he later ordered it taken down, after talking with a Board attorney at the time of the Company's settlement with Hogan.

There is thus no documentary evidence of Bryant's and Turner's temporary experience in the assemble & test department immediately prior to March 1, 1993, when they were transferred there. It is also evident that they were transferred without submitting a bid, contrary to the established procedure for transfers. Although Gearhart spoke of staffing plans, he did not submit any, and did not articulate how such plans could bypass the bidding requirements. Gearhart admittedly had no explanation for not using Bryant and Turner for the asserted new ''Houston Shipping department'' requirements. Instead, he transferred Curvin and Thomas into Shipping to fill the gap caused by the departures of Bryant and Turner.

The Respondent did not call as witnesses either the supervisors of assemble & test, and shipping, nor employees Bryant and Turner. I conclude that their testimony, if elicited, would have been adverse to the Company's interest. *Master Security Services*, 270 NLRB 543, 552 (1984).

On the basis of Bryant's and Turner's personnel records and the roster of assemble & test employees, I conclude that they were transferred there on the indicated date of March 1, 1993. It follows that Gearhart's statements to Hogan in February that there were no vacancies in assemble & test were false.

E. *''Rollback,'' and the Issue of Junior Employees in Assemble & Test*

1. The rehiring of Virgil Brown in 1992

With respect to the issue of whether there were any employees in assemble & test who were junior to Hogan, the Company's records show that Virgil Brown held jobs for many years in the Finishing department (listed as department 12), and in assemble & test (also listed as department 12). In September 1989, he returned to a former job in the foundry as a ''rollback,'' and in July 1991 was returned to assem-

[27] The testimony of Personnel Supervisor McLeroy establishes that Gearhart's first name was ''Edward,'' that he was known as ''Ed,'' and that there were no other ''Ed's'' or ''Eddie's'' in management.

[28] G.C. Exh. 9.

[29] G.C. Exhs. 26, 29, and 30.

[30] G.C. Exh. 32.

[31] G.C. Exh. 31.

[32] G.C. Exh. 42.

[33] G.C. Exh. 30.

[34] G.C. Exh. 29. Only the first name of ''David'' appears on this exhibit, and the last name is blocked out. However, the employee number ''350'' appears on this exhibit. This is the same number which appears before Turner's name on the departmental roster for March 2, 1993. G.C. Exh. 42. R. Exh. 14 is the first page of Turner's personnel record, with his last name appearing there, and the same ''350'' employee number.

ble & test, ''the job held before rollback,'' according to his personnel record.[35]

Brown was discharged in the May 22 reduction in force, but was rehired on July 27, 1992, and given a temporary job for 1 month in the cleaning room. He was assigned as ''assemble & test V'' on August 28, and was given permanent status 2 months later. On this occasion, the department was listed as ''Hays,'' but the ''assemble & test V'' classification remained the same. On January 1, 1993, the assemble & test and Hays departments were consolidated.[36]

It is clear that Brown did not obtain the 18-month extension of original seniority which Hogan obtained pursuant to the settlement agreement. Accordingly, he was junior to her. The Company argues that Hogan did not know what Brown was doing in the department at the time of the hearing.[37] The point is that he was put into assemble & test, his former department, 1 month after being rehired. Although the department was momentarily listed as ''Hays,'' the departments were consolidated in January 1993. It follows that Gearhart's statement to Hogan in February—that there were no employees junior to her in assemble & test—was erroneous.

2. The ''Rollback'' of Jackie Hogan in 1991

Jackie Hogan testified that, prior to 1991, an employee wishing to return to a former job had to bid for it. This policy changed in 1991, however, so as to allow an employee to return to his or her last department without filing a bid. This was called a ''rollback.'' In support of this position, Hogan asserted that she had been in assemble & test in the first half of 1991. In June of that year, there was a reduction in force. Hogan was not laid off, but was compelled to transfer to the cleaning room. A month later, in July 1991, she bid on a job in the machine shop, and received it.[38] In October 1991, the Company posted two openings in assemble & test, one for the first shift and another for the second. Hogan was fifth on the seniority list, but was awarded the job. The seniority list has a notation reading: ''Must allow Jackie to rollback to AT&T [sic]. Posting for second shift was a mistake.''[39] The parties stipulated that ''AT&T'' meant assemble & test. Hogan testified that at least one other employee, whom she identified, was ''rolled back'' to her former job.

The Company argues that Hogan was not entitled to the same treatment in 1992 that she received in 1991. In the earlier year, she had merely been bumped to another job, whereas in 1992, she had been laid off. The Company attempts to discount the example of Virgil Brown by arguing that there is nothing in his personnel file to indicate that his return to assemble & test was the result of a ''rollback.''[40] Further, the Company argues, its ''policy '' in 1992 was not necessarily its policy in 1993. In addition, Hogan came back in 1993 pursuant to a settlement agreement, and prior policy is irrelevant.[41]

3. Factual analysis

It is undisputed that an employee bumped to a different job as the result of a reduction in force was entitled to the next opening in the prior job in 1991, without filing a bid. The case of Virgil Brown shows that the same policy was applied in 1992 to a case where the employee had been laid off, not merely bumped to a different job. Respondent's argument that the magic word ''rollback'' does not appear in Brown's personnel record is inaccurate, and in any event, does not alter the reality of what happened. Brown went back to his former job after being laid off.

The Company's argument that Hogan was returned to a different job pursuant to a settlement agreement is weakened by the fact that the Company misrepresented that there were no openings in assemble & test.

Finally, the argument that 1992's ''policy'' was not necessarily 1993's ''policy'' suggests that the Company could evidence a change in policy merely by doing something different—after a union campaign, the filing of an unfair labor practice charge, and the issuance of a complaint.

I conclude that the Company's last-known policy in 1991 was to return employees to their former positions after a reduction in force, whether they had been bumped to another job or actually laid off, without requiring a bid.

F. *Hogan's Reinstatement*

In mid-February 1993, following the complaint alleging that Hogan had been discharged discriminatorily, Plant Manager Gearhart called Hogan and offered her a job as an ''incentive grinder.'' Hogan replied that she wanted to return to her former job in assemble & test. As indicated, Gearhart told her that there were no jobs, and no employees junior to Hogan. She accepted the incentive grinder position on February 22, 1993, and reached an oral agreement with Gearhart. The written settlement agreement was signed on March 3, 1993, and the Regional Director approved it on March 9.[42] Hogan returned to work on March 29.

The incentive grinder position was in the cleaning room. Judy Vinson, an incentive grinder, testified that there were two incentive grinders and one incentive buzzer, while Hogan asserted that there were three incentive buzzer jobs. In any event, according to Vinson, there were no openings in the cleaning room when Hogan returned to work. The one buzzer grinder job was filled by Barbara Popham. The Company transferred Popham to ''the regular grinding rock,'' at a reduction in pay. Popham was visibly angry about this transfer, according to Judy Vinson. Hogan was then put in the buzzer grinder job. The position had adverse environmental conditions, and Hogan became ill working at this job, as described hereinafter. Further, according to Hogan, the incentive buzzer work was much faster than that in the incentive grinder job.

Crediting Judy Vinson, I conclude that there was no vacancy in the incentive grinder or buzzer grinder jobs. From the fact that Popham was angry about this transfer to a lower paying job, I find that it was involuntary on her part. Accordingly, I conclude, the Company created this vacancy and reinstated Hogan in that job, at a time when there were vacancies in assemble & test.

[35] G.C. Exh. 27.
[36] Id.
[37] R. Br. 20.
[38] G.C. Exh. 7.
[39] G.C. Exh. 17.
[40] R. Br. 29.
[41] Id. at 30.
[42] G.C. Exh. 3.

G. *The July Vacancy and Hogan's Disability*

Earl Williamson, an employee in assemble & test, retired on July 2, 1993,[43] The Company did not post a job for the vacancy thus created.

Six days later on July 8, Hogan was placed on disability. She had developed a skin rash and welts, and was directed to use a cream and have no contact with brass or nickel for 2 weeks,[44] Hogan was 52 years of age,[45] and also suffered from arthritis. She described her working environment as a buzzer grinder—it was nasty, dusty, and hot. The employees' blood was tested for lead levels, and they were required to take daily showers on their own time. Hogan showed the welts she had acquired to Personnel Manager Huddleston. Judy Vinson corroborated Hogan, referred to ''brass dust,'' stress, ''a big wheel coming at you,'' and called the job ''dangerous.'' Donald Vinson, who also worked in the department, said that the pressure he had to exert on the buzzer bothered his back and elbow, while ''that excess metal from the fittin' would fly all up in [his] face and all up [his] nose.'' Hogan said she turned green.

Hogan's last job in assemble & test, by contrast, consisted of testing parts for leaks by placing them in water and watching for air bubbles. I conclude that the buzzer grinder job was much more onerous than Hogan's last job in assemble & test.

Four days after the beginning of Hogan's disability, i.e., on July 12, the Company, with Gearhart's approval, gave Steve Jones a 90-day temporary transfer from his job as a molder in the foundry to the assemble & test department. The asserted reason was that Jones had suffered a job-related shoulder injury in December 1992, and was precluded from remaining on a molding machine.[46] Jones' personnel record shows that he returned to duty on May 3, 1993.[47] At that time, he had a 30-pound lifting restriction.[48] Despite the restriction, he worked in the foundry until July 2, when his lifting restriction was raised to 40 pounds.[49] There is no evidence of what Jones was doing in the foundry after his return to duty. Personnel Specialist McLeroy testified that Foundry Supervisor Johnny Greenwood would have known this. However, Greenwood was not called as a witness. Donald Vinson testified that foundry employees with weight-lifting restrictions were put on a ''breakoff'' job, and that there were other ''light'' jobs in other departments to which the Company assigned employees with impairments.

The Company's published policies permit a 60-day transfer of an employee to a different job ''if necessary, due to production requirements.''[50] As indicated, the asserted rationale for Jones' transfer did not specify that it was because of production requirements. Later, the 90 days on the transfer were changed to 60 days.[51]

[43] G.C. Exh. 40.
[44] G.C. Exh. 40.
[45] G.C. Exh. 7.
[46] G.C. Exh. 37.
[47] G.C. Exh. 36.
[48] R. Exh. 17.
[49] G.C. Exh. 36.
[50] G.C. Exhs. 6, 11.
[51] G.C. Exh. 37.

H. *The First Unfair Labor Practice Charge, the August Vacancy, and Hogan's Renewed Union Activities*

On July 20, 1993, the Union filed an unfair labor practice charge, alleging that the Company had refused to allow Hogan to return to the assemble & test department because of her union activities, and had deviated from past practice by not transferring her to another department while she was recovering from a temporary disability.[52]

Hogan had been asking her supervisors for a transfer from the first shift to the second shift because, she stated, it was not as dusty as the first shift. The supervisors told her that Gearhart would not approve it. Hogan then asked Gearhart. He replied that she had to stay on the first shift until she died, because he ''had to watch her.'' Gearhart later told her that he was ''just kidding,'' but Hogan affirmed that he looked serious.

During April, Hogan assisted the Union in a hearing on challenged ballots, and, in August, she resumed handing out union authorization cards.

The Company posted a job in the machine shop on August 6, and filled it with an assemble & test employee, Lummie Battle[53] No job in assemble & test was posted to fill the vacancy created by Battle's departure.

On August 16, 1993, the Company allowed Hogan to transfer to the second shift, at a lower rate of pay. Hogan testified that she did so in order to avoid the excessive dust on the first shift.

I. *The September Posting and the Award of Jobs*

Steve Jones completed his 60-day temporary assignment in assemble & test on September 13, and was transferred back to the machine shop.[54] On September 21, 1993, the Region dismissed the Union's charge filed on July 20, 1993.[55]

Two jobs were posted for the assemble & test department on September 16. There were 21 bidders, including Hogan and Steve Jones.

The employees were rated by Plant Manager Gearhart, rather than by the departmental supervisor. Although Gearhart claims that he had previously rated job applicants when he was personnel manager, his rating of the applicants for the September 16, assemble & test posting was the first time he had done so as plant manager. This was contrary to past practice, as established by the testimony of Personnel Supervisor McLeroy, the experience of Judy Vinson, Geraldine Bradford, and Henry McRath protesting ratings, and documentary evidence.[56]

Gearhart rated the employees in the categories required by the handbook.[57] He graded four employees—Marlon Greenwood, Steve Jones, Mark Watts, and Jackie Hogan. Greenwood had about 10 years of experience in assemble & test,[58] Hogan over 4 years,[59] and Steve Jones 60 days.[60] Nonethe-

[52] G.C. Exh. 4.
[53] G.C. Exh. 35.
[54] G.C. Exh. 36.
[55] G.C. Exhs. 4–5.
[56] G.C. Exhs. 16, 19; R. Exhs. 2, 5.
[57] Seniority; attendance; work habits, ability and experience; and physical condition. Supra, sec. C.
[58] G.C. Exh. 39.
[59] G.C. Exh. 7.
[60] The record does not disclose Watts' experience.

less, Gearhart rated them as ''substantially equal.'' Since Greenwood and Jones were the senior bidders, they were awarded the jobs.

In assessing Hogan, Gearhart rated her as ''good'' in attendance (''ATT''), while the other three top applicants were rated as ''good'' or ''good to excellent'' in this category. No evidence of absenteeism or tardiness by Hogan was submitted, other than her 2-week period of disability. In determining relative work habits, Gearhart considered Hogan to be ''fair to poor,'' while the other applicants were considered to be ''good.''[61]

Hogan had been rated previously by supervisors, at various times, on ''production,'' ''conduct,'' ''safety,'' ''quality of work,'' and ''dependability.'' She received six ratings by four different supervisors between April 20, 1989, and July 29, 1991, and was given the top mark of ''good'' in all categories, except, on one occasion, her ''conduct'' was rated as ''fair.''[62] On July 22, 1993, a supervisor rated Hogan at the top mark of ''good'' in production, safety, quality of work, and dependability, but considered her ''conduct'' to be ''fair.''[63] Hogan was then working as a buzzer grinder, and protesting her assignment. On August 11, 1993, an unknown supervisor rated her as ''good'' in production, safety, and quality of work, but ''fair'' in conduct and dependability.[64] As indicated, Hogan had renewed her union activities. On cross-examination, Gearhart summarized his opinion of Hogan as a ''fair to poor'' employee.

On September 30, 1993, Hogan filed the charge which resulted in the complaint being litigated in the case at bar. As indicated, complaint issued on November 26. Four days later, on November 30, the Company posted a job in the machine shop. Henry McRath, the senior bidder, was offered the job but declined. It was next offered to Hogan, who also declined.[65]

The Company's personnel rosters show that assemble & test had 15 employees at the end of January 1993, and 20 in January 1994, including 3 part-time employees.[66] During this period, Hogan was assigned to the jobs indicated above.

J. *Legal Analysis and Conclusions*

As indicated, the complaint alleges that Respondent refused to return Hogan to her former job on April 1, 1993, including its refusal to award her the assemble & test job in response to the September 16, 1993 posting for discriminatory reasons. In order to establish the alleged violation, the General Counsel has the burden of establishing a prima facie case that protected conduct was a motivating factor in the Company's failure to place Hogan in this job. Once this is established, the burden shifts to the Respondent to demonstrate that Hogan would not have been assigned the job she wanted even in the absence of the protected conduct.[67]

Respondent contends that the General Counsel is attempting to set aside the settlement agreement. This is denied by the latter, who argues merely that the Company committed postsettlement unfair labor practices ''after April 1, 1993, including but not limited'' to its refusal to award her a job in the assemble & test department in September 1993.[68] In light of the General Counsel's position, the issue of whether the settlement agreement should be set aside is not before me.

Hogan was clearly the leader of the union movement. Her confrontation with Plant Manager Gearhart in February 1992, in which he told her that he could fire her without a reason, that he could fire all the employees, and was going to fight the Union ''with everything that he had,'' establishes Respondent's animus against the Union in general, and against Hogan in particular.

Hogan was an observer for the Union during the election in June 1992. After she returned to work following the settlement, she assisted the Union on a hearing on challenged ballots (April 1993). On one occasion, when she requested a shift transfer, the plant manager told her that she would have to stay there so that he could ''watch'' her.

During the negotiations leading to the settlement agreement, the Company falsely told Hogan that there were no openings in the assemble & test department, nor were there any employees there who were junior to her. Relying on these misrepresentations, Hogan accepted Respondent's offer to return Hogan to an ''incentive grinder'' position (with backpay). The Board has concluded in another case that the discharges of certain employees were unlawful, where they were predicated on false statements by the employer that the plant would soon be closed (in order to induce union acceptance of a severance plan). *Sheller-Globe Corp.*, 296 NLRB 116 fn. 3 (1989). The same reasoning is applicable here. Respondent's misrepresentations to Hogan constitute evidence that its failure to return her to the assemble & test department was discriminatorily motivated.

The Company did not in fact return Hogan to the ''incentive'' grinder job. Instead, she went to a ''buzzer'' grinder position, which was ''faster'' than the other job. It was also more onerous than the assemble & test job, and caused Hogan to suffer the disability described above.

The Company created the buzzer grinder vacancy by transferring Barbara Popham out of that job. It has advanced no business reason why it did not put Hogan into one of the assemble & test openings instead of transferring Bryant and Turner into that department—without bids. There is no apparent reason for the Company's first posting a job vacancy in assemble & test on February 23, 1993, taking it down as the settlement was being negotiated, and then transferring Bryant and Turner into the same department.

The Company's failure to return Hogan to her former job was contrary to its past practice, at least since 1991. Hogan in that year was allowed to ''rollback'' to assemble & test after previously being transferred to the cleaning room. Although the Company argues that the policy was different

[61] G.C. Exh. 13.

[62] Id.

[63] Id.

[64] Id.

[65] G.C. Exh. 14. Hogan testified that she declined because an empoyee told her that the machine shop supervisor said it would be ''a cold day in hell'' before Hogan could work in his department. I make no finding on whether the supervisor actually said this.

[66] G.C. Exh. 42.

[67] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[68] G.C. Br. 1.

after a layoff, Virgil Brown was put back in the same assemble & test job after having been laid off in 1992. This departure from past practice constitutes additional evidence of discriminatory motivation. *Felbro, Inc*., 274 NLRB 1268, 1283 (1985), enfd. in part sub nom *Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986).

The evidence shows that the Company failed to transfer Hogan to assemble & test as additional vacancies were created by the departures of other employees, in July (Williamson), and in August (Battle). The timing of the events in July is significant. Williamson left assemble & test on July 2. The Company made no move to fill the vacancy at that time. Hogan's disability started on July 6, and the Company promptly transferred Steve Jones into that position, first for 90 days, which was contrary to the handbook (later corrected to 60 days). Although the handbook specified that such transfers were to be made for production reasons, Jones was transferred because he had a ''disability.'' He had already worked in the foundry for several months, his lifting restriction had been reduced, and there is evidence that the foundry had light jobs for employees with lifting restrictions. Hogan, who also had a disability, was not given similar consideration. This constituted disparate treatment, and is further evidence of discriminatory motivation. *Pilliod of Mississippi*, 275 NLRB 799, 816 (1985).

Respondent continued to depart from past practice in its handling of the September 16, 1993 posting of two jobs in assemble & test. For the first time, Gearhart, as plant manager, rated the applicants. The Company advances no reason for not letting the departmental manager do the ratings.

In the important category of prior experience, Gearhart rated Marlon Greenwood, with 10 years of experience, Jackie Hogan, with over 4 years, and Steve Jones, with 60 days, as ''substantially equal.'' This is implausible on its face, and is contrary to the Company's past practice of giving weight to greater experience. Since Gearhart knew that Greenwood and Jones were senior to Hogan, all he had to do was rate Hogan and Jones as ''substantially equal,'' and let seniority be determinative.

In addition to Gearhart's taking over for the departmental manager in making these determinations, his discriminatory motivation is evidenced by the fact that he gave Hogan lower grades than the other supervisors who had rated her. His written determination states that her work habits were ''fair to poor.'' No other supervisor had ever rated her as ''poor'' in any category. Finally, on cross-examination, Gearhart revealed his bias—Hogan was simply a ''fair to poor'' employee. The only explanation for the disparity between Gearhart's assessment of Hogan and that of various supervisors is that he had animus against her because of her union activities. The combination of (1) Gearhart's first-time and unexplained evaluation of applicants, (2) unlikely rating of applicants with wide disparities in experience as ''substantially equal,'' contrary to past practice, and (3) rating Hogan lower than other supervisors had done, constitutes persuasive evidence that Respondent's failure to select Hogan was unlawfully motivated.

Finally, the Company had five more employees in assemble & test at the beginning of 1994 than it had a year earlier and three of them were part-time employees.

I conclude that the General Counsel has established a strong prima facie case that Respondent's refusal to return Hogan to her former job in assemble & test was discriminatorily motivated. The same evidence shows that the Company would have returned Hogan to this job, absent its antiunion animus, and, accordingly, that it has not rebutted the prima facie case.

The complaint alleges the beginning date of discrimination as April 1, 1993. Hogan had returned to work on March 29. In February, during her settlement discussions with Plant Manager Gearhart, she made known her desire to return to her former job, and I conclude that this constituted an application for this job. The settlement did not invalidate this application, since it was based on false statements made by Respondent. Accordingly, the application survived the settlement.[69] On April 1, 1993, Hogan would have already been placed in assemble & test absent Respondent's assignment of two employees to the department for which she had applied. I conclude that the discrimination against her began on the alleged date of April 1, 1993. It was repeated each time a vacancy occurred during the summer of 1993, again in September after the two postings, throughout the remainder of 1993 (which ended with more employees in the department than had been there previously, including part-timers), and continues to date.

By engaging in the foregoing conduct, Respondent has violated and is violating Section 8(a)(3) and (1) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Lee Brass Company is an employer engaged in commerce within the meaning of Section (2), (6), and (7) of the Act.

2. Glass, Molders, Pottery, Plastics, and Allied Workers International Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Beginning April 1, 1993, and continuing to date, Respondent has refused and is refusing to return Jackie Hogan to her former job in the assemble & test department, because of her leadership role in and activities on behalf of the aforesaid labor organization, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The General Counsel has requested an ''appropriate'' remedy.[70]

I shall recommend that Respondent, on Hogan's request, forthwith transfer her to her former job in the assemble & test department.

It is unclear whether Hogan suffered any loss of wages because of Respondent's unlawful refusal to assign her to assemble & test. However, she may have incurred medical expenses because of her assignment as a buzzer grinder, and I shall recommend that Respondent be ordered to compensate for any such expenses. *Pilliod of Mississippi*, supra at 820. Such issues can be resolved in a supplemental proceeding.

Any backpay due shall be paid in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289

[69] See *Handy Andy, Inc*., 296 NLRB 1001 (1989).

[70] G.C. Br. 27.

(1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[71]

Respondent presented evidence that it had filed a petition to be adjudicated bankrupt, and is currently under the jurisdiction of the Bankruptcy Court. It is well settled that Respondent's status in this respect does not bar a make-whole order from the Board. *Hiysota Fuel Co*., 285 NLRB No. 17 (1987) (not reported in Board volumes).

On these findings of fact and conclusions of law and on the entire record, I issue the following[72]

ORDER

The Respondent, Lee Brass Company, Anniston, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Glass, Molders, Pottery, Plastics and Allied Workers International Union, or any other labor organization, by failing to reinstate to or transfer employees to their former jobs, because of their union or other protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On Jackie Hogan's request, transfer her forthwith to her former job in the assemble & test department.

(b) Make whole Jackie Hogan for any loss of wages she may have suffered because of Respondent's unlawful refusal to transfer her to the assemble & test department, in the manner described in the Section of this Decision entitled the Remedy. In addition, Respondent shall compensate Hogan for any medical expenses she may have incurred because of her disability at the Respondent's plant subsequent to her return to work.

(c) Preserve and, on request, make available to the Board or its agents, for copying, all payroll records, social security payment records, timecards, and all other records necessary to analyze the remedial action necessary under the terms of this Order.

(d) Post at its plant, at Anniston, Alabama, copies of the attached notice marked ''Appendix.''[73] Copies of said notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and e maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[71] Under *New Horizons*, interest is computed at the short-term Federal rate for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987, (the effective date fo the amendment) shall be computed as in *Florida Steel Corp*., 231 NLRB 651 (1977).

[72] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[73] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''